IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-553

DOMINIC S. RINALDI,

Petitioner,

—against—

HOLT, RINEHART & WINSTON, INC. and JACK NEWFIELD,

Respondents.

BRIEF FOR RESPONDENT JACK NEWFIELD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 7, 1977

INDEX

CITATIONS

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Respondent Jack Newfield ("Newfield") prays that the Petition for a writ of certiorari to the Court of Appeals of the State of New York to review the judgment entered on July 14, 1977 be denied.

Jurisdiction

The judgment below is not reviewable by writ of certiorari, since it is based on an independent and adequate state ground. Where a ruling is based on state procedure and state substantive law, it is well established that the state grounds are adequate to support the judgment and this Court lacks jurisdiction to review such a judgment. Stern and Gressman, *Supreme Court Practice*, § 3.33 (4th ed. 1969).

The Petition does not question the applicability of the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254

(1964), that a public official libel plaintiff is required to prove actual malice by clear and convincing evidence. All six questions presented by petitioner attempt to reargue the issue of the sufficiency of the evidence of actual malice.* (P 5-6)

The dispositive portion of the decision of the New York Court of Appeals involved the application of § 3212 of the New York Civil Practice Law and Rules. (A 32) The Court of Appeals found that there was no triable issue of fact applying New York summary judgment procedures under New York decisional law. In awarding summary judgment, the court below cited four New York cases**, and an Idaho case, *Bandelin* v. *Pietsch,* —— Idaho ——, 563 P. 2d 395 (1977). (A 32) *Bandelin* involved a similar motion for summary judgment under Idaho law; in that case this Court has recently denied a petition for certiorari. —— U.S. ——, 46 U.S.L.W. 3242 (October 11, 1977). The analysis below of the sufficiency of the evidence on a motion for summary judgment was certainly a matter of state law.

Zacchini v. *Scripps Howard Broadcasting Co.,* —— U.S. ——, 53 L. Ed. 2d 965 (1977), cited by petitioner (P 2) is inapposite. That case involved a claim that a television broadcast of newsworthy material was protected by the First Amendment despite the plaintiff's "right of publicity." The Court specifically found that the Ohio decision was based on federal grounds alone.

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* Page reference to the Petition will be cited as (P 1 et seq.), to petitioner's Appendix as (A 1 et seq.) and to respondents' Joint Appendix on Appeal in the New York Court of Appeals as (R 1 et seq.).

** *James* v. *Gannett Co.,* 40 N.Y. 2d 415 (1976); *Chapadeau* v. *Utica Observer Dispatch,* 38 N.Y. 2d 196 (1975); *Trails West, Inc.* v. *Wolff,* 32 N.Y. 2d 207 (1973); *Gilberg* v. *Goffi,* 21 A.D. 2d 517, aff'd 15 N.Y. 2d 1023 (1965).

Questions Presented

1. Where a perjury and obstruction of justice indictment, which asserts that the grand jury has been investigating corrupt disposition of criminal cases, is pending against a judge, whose sentencing and dispositions in cases involving organized crime defendants have been widely criticized by the press and legislative investigators and where a reporter has obtained additional evidence of improper dispositions by the judge, does publication of the terms "probably corrupt" or "suspiciously lenient" when applied to the judge constitute protected expression of opinion or actionable statement of fact?

2. Where the court below awarded summary judgment pursuant to state common law and a state statute, does a Petition seeking to reargue the court's analysis of the sufficiency of the evidence of actual malice raise a substantial constitutional question warranting Supreme Court review?

Statement

From the latter part of 1972 until early 1974, Respondent Jack Newfield ("Newfield") was working with his editor, Marian Wood of Holt, Rinehart & Winston ("Holt") in connection with the manuscript of *Cruel and Unusual Justice* (the "Book"). Rather than respond to the mass of detail contained in the Petition, a chronological summary of the material events is set forth below:

Date	*Event*
June 15, 1972	The New York Joint Legislative Committee on Crime at a public

Date	*Event*
	hearing named four State Supreme Court Justices, including petitioner, who imposed questionably lenient sentences in felony narcotics cases. (R 368)
June 16, 1972	A report of the hearing appeared in the *New York Daily News* naming petitioner as one of the four State Supreme Court Justices who handed down "wrist slap sentences in felony narcotics cases." (R 368)
June 17, 1972	A *New York Daily News* editorial called for the convening of a Court on the Judiciary (the court with removal power) to review allegations against petitioner and three other judges for "astonishingly minor sentences in various major felony cases." (R 369)
August 8, 1972	Norman Burton, a non-addict heroin dealer was arraigned before petitioner on a charge of an attempt to bribe Police Officer William David, who had previously arrested Burton on two felony narcotics charges. At the arraignment, after learning that the assistant prosecutor in court did not have the file,*

* The Rackets Bureau Chief had given instructions to seek $10,000 bail to a different assistant (R 508), who went to the wrong courtroom. (R 509) The Bureau Chief subsequently described petitioner's conduct at the arraignment as "outrageous". (R 508-509)

Date	*Event*
	petitioner announced he was going to fix bail for plaintiff. Upon learning that the arresting officer was in court, petitioner called the officer to the bench, abused him in open court, and then paroled the defendant. (R 200-202)
August 8-27, 1972	Respondent Newfield learned from Police Officer David and his Supervising Sergeant, Thomas Santise, of the circumstances surrounding the arraignment of Burton, reviewed the information made public at the hearing of the New York State Joint Legislative Committee on Crime (R 516) and wrote the first article about petitioner (A 120), which was published in the August 31, 1972 issue of the *Village Voice.*
September-October 1972	Respondent Newfield conducted further investigation regarding questionable dispositions involving defendants associated with organized crime, including the review of files maintained at the office of the New York Joint Legislative Committee on Crime. (R 516; 587-89)
September 25, 1972	An article entitled "Study Shows Courts Lenient with Mafiosi" appeared on the front page of the *New York Times.* (A 136-139, R 370-72) The article contrasted the lenient

Date	*Event*
	sentences imposed in *People* v. *Vario* and *People* v. *Agro* upon two defendants with well-known associations with organized crime and long criminal records with the five year sentence imposed by petitioner upon a 19-year old Puerto Rican first offender.
October 16, 1972	The *New York Magazine* issue of this date contained the article entitled "The Ten Worst Judges In New York". (A 134-135; R 473-474)
October 12, 1972 October 17, 1972 November 28, 1972	Letters from Messrs. Morello, Wexler and Connolly were written to the Editor of *New York Magazine.* (A 183-187) The Brooklyn Bar Association Report (the "Brooklyn Bar Report") referred to in the Connolly letter was not made available with the letter.
April 1973	Petitioner instituted an action for libel against The Village Voice, Inc., based on an advertisement published in the *New York Times* on February 25, 1973. The advertising firm of Scali, McCabe, Sloves was subsequently added as a party defedendant (hereafter referred to as the "Scali case"). (A 114-139)
June-October 1973	Three days of discovery proceedings in the Scali case were held, and both petitioner and Newfield were

Date	*Event*
	examined under oath. During Newfield's examinations copies of the transcripts in *People* v. *Burton*, *People* v. *Vario* and *People* v. *Glover* as well as the letters from Morello, Wexler and Connolly were marked as exhibits.
November 13, 1973	The Special State Prosecutor released a grand jury indictment charging the petitioner with the commission of four felonies, namely three counts of perjury and one count of obstruction of justice.* (A 290-298)
	The indictment received extensive publicity in the New York media, a

* The indictment stated in part:

". . . The Grand Jury has been conducting an investigation to determine whether the defendant, a Justice of the Supreme Court, has conspired with certain lawyers to dispose of criminal cases in a *corrupt manner*. More specifically, the Grand Jury is investigating to determine whether the defendant has been *corruptly influenced* in relation to the disposition of a criminal case in Nassau County entitled *People* v. *Gomes*, et al. . . ."

"The testimony was to a material matter, in that the defendant's efforts on behalf of Gomes and his accomplices would tend to support the allegation, being investigated by this Grand Jury, that the defendant was part of a *corrupt scheme* to obtain a lesser plea and a lenient sentence in that case."

". . . The Grand Jury has been conducting an investigation to determine whether the defendant, a Justice of the Supreme Court, has conspired with certain lawyers to dispose of criminal cases in a *corrupt manner*. More specifically, the Grand Jury has been investigating to determine whether the defendant had *corruptly influenced* the disposition of a criminal case in Kings County entitled *People* v. *McCauley* . . . [emphasis supplied]". (R 280-286)

Date	*Event*
	sample of which appears at R 287-288.
November 1973	Newfield obtained a copy of the Brooklyn Bar Association Report (the "Brooklyn Bar Report") prepared in 1972. (R 514)
December 1973	Newfield completed his work on the Book.
January-February 1974	The Book was printed and bound.
March 16-18, 1974	Copies of the Book were placed on sale in bookstores. (R 348)
April 9, 1974	The City Bar Association released the report of its Committee on State Courts of Superior Jurisdiction (the "City Bar Report"). The report evaluated the charges against the eight State Supreme Court Justices mentioned in the article "The Ten Worst Judges in New York", sustained in part the charges as to six of the judges named, but did not sustain the charges as to petitioner. (R 151-178)
April 19, 1974	The Appellate Division sustained the third and fourth counts of the indictment. *People* v. *Rinaldi,* 44 A.D. 2d 745 (1974).
June 14, 1974	The New York Court of Appeals rejected the appeal by petitioner to dismiss the entire indictment. *People* v. *Rinaldi,* 34 N.Y. 2d 846 (1974).
July 1974	Petitioner was tried before a jury and acquitted.
August 1974	Petitioner instituted the present action against the publisher of the Book, the author of the Book and The Village Voice, Inc.*

Reasons for Denying the Writ

As discussed above in the section on jurisdiction, the decision of the Court of Appeals rested on an independent and adequate state ground. Accordingly, there is no jurisdiction for Supreme Court review. In addition, there are three further grounds to deny the Petition pursuant to established principles of Supreme Court practice.

POINT I

There Is No Important Question of Constitutional Law Presented Requiring Supreme Court Review.

Rule 19 of the Supreme Court sets forth the appropriate grounds upon which petitions for certiorari to review state court decisions are considered. None of those grounds are presented in this case. There is no conflict between the decision below and that of any other court which requires resolution by Supreme Court action; no new or novel ques-

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* The court of first impression dismissed the claim against The Village Voice, Inc., which dismissal was unanimously affirmed by the Appellate Division. Petitioner did not appeal from that dismissal.

tion of constitutional law was decided below; as demonstrated in Point II of this brief the decision of the Court of Appeals was clearly correct and applied settled principles of law as announced by this Court; this case does not involve constitutional questions of broad significance but rather turns on whether or not petitioner's evidence is sufficient to meet his burden of proof and merely requires for its resolution the analysis of the particular facts offered.

The Court of Appeals applied the rule of *New York Times Co.* v. *Sullivan, supra,* requiring petitioner, as a public official libel plaintiff, to bear the burden of proving with convincing clarity the falsity of the statements about him and the actual malice on the part of respondents. Petitioner does not challenge this rule of law, nor its applicability to the petitioner, but merely argues that the Court of Appeals did not correctly apply this settled rule to the facts. However, Supreme Court Rule 19(1) requires that special and important reasons be present for the granting of certiorari where the legal principles involved are clearly correct and are not challenged by the petitioner.

Where the issue turns only on the analysis of a given fact pattern, the case is not one which requires the attention of the Supreme Court. Supreme Court review is appropriate for cases which have some national significance or present an opportunity for the clarification of important principles; even where a state court has erred, certiorari will not be granted without the presence of an issue of wide significance. Stern & Gressman, *Supreme Court Practice,* § 4.18 (4th ed. 1969).

In *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508 (1924) a writ was dismissed as improvidently granted when it appeared from the briefs and argument that, rather than involving a question of federal law

important to the public at large, the case turned on the factual question of whether the evidence sufficed to establish the dedication of the petitioner's property to public use.

The Petition amounts to little more than an attempt to reargue the sufficiency of the evidence offered to prove actual malice and falsity. The Petition contains no more than 2 or 3 pages of legal argument; the remainder of the 45 pages consists of specific reference to the proof offered by the petitioner in the proceeding below. There is no showing in the Petition of the significance of this issue to other litigants or to the development of the constitutional law of libel. The Court of Appeals did not hold, as alleged by petitioner, that the "knowing omission by a publisher of crucial facts showing the falsity of the publication was a permissible exercise of editorial judgment." (P 13) What the Court of Appeals *did* hold was that, in the context of an article on court reform and in view of the extensive investigation undertaken by Newfield, the omission of relatively minor facts in a basically accurate account was not actionable. As noted at page 12 *infra,* the holding was a matter of New York common law. This decision would scarcely deprive the naked wife, who was examined by her doctor, from the slander claim described in the Petition. (P 37) The Court of Appeals did not establish any different or greater burden of proof, as asserted by petitioner (P 13), but merely held that this petitioner on this particular set of facts did not satisfy his burden under New York summary judgment procedure.

As Chief Justice Taft remarked in *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923), "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties."

POINT II

The Decision Below Is Clearly Correct.

The New York Court of Appeals granted summary judgment in favor of respondents on two independent grounds.*

The court below correctly held that the omissions from the publication of the prosecutor's consent or acquiesence to the dispositions in the four criminal cases whose transcripts were before the court (*Burton, Glover, Vario* and *Agro*) were "not so material as to alter significantly the conclusion to be drawn from the episodes reported." (A 30)

This holding was based on a state common law analysis, in which a judge's ultimate responsibility for sentences was weighed, together with the subjective context in which the material was published. *James* v. *Gannett Co.*, 40 N.Y. 2d 415 (1976). In the context of an ardent plea for prison and court reform, the court correctly found that the omission of "relatively minor details in an otherwise basically accurate account is not actionable." (A 31)

With respect to the terms "probably corrupt" and "suspicious leniency," the court correctly held that petitioner had failed to establish either that these terms were factually false or that they were published with actual malice.

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* Except for the terms "probably corrupt" and "suspiciously lenient," the court below also correctly held that the language in suit constituted the expression of opinion which, when published with the reasons for the author's views, was absolutely protected by the First Amendment. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). (A 23-27) The Petition does not question the constitutional protection afforded to opinion, nor even the court's holding that the First Amendment protected the severely critical observations about petitioner's conduct in office, i.e., that he was incompetent and should be removed from office.

A. "Suspiciously Lenient in Felony Narcotics Cases"

While the court below read this phrase as implying a statement of fact, Newfield contends that, since the reasons for his conclusions were included, the phrase constituted protected expression of opinion. *Hotchner* v. *Castillo-Puche,* 551 F. 2d 910 (2d Cir. 1976), *cert. den.,* —— U.S. ——, 46 U.S.L.W. 3202 (1977).

The uncontroverted facts in the Book fully support the opinion. In *People* v. *Glover,* a known non-addict heroin dealer, charged with narcotics felonies, even while on bail on earlier charges and following his plea of guilty to an unrelated federal charge, received an illegal conditional discharge following a plea of guilty to a Class C felony. (R 206-214) Under oath, petitioner admitted he knew the sentence was illegal at the time it was imposed. (R 707) This remarkable leniency had been cited at the hearing of the Joint Legislative Committee on Crime, characterized as a "wrist-slap sentence" in the *New York Daily News* (R 368) which then called for the convening of a Court on the Judiciary to review this "astonishing" disposition. (R 369)

Petitioner's dispositions in *People* v. *Vario* and *People* v. *Agro* had been harshly criticized on the front page of *The New York Times* in the article entitled "Study Shows Courts Lenient with Mafiosi—Racketeers Found Less Likely To Be Convicted In The State Than Others." (R 370-372)

Furthermore, petitioner has conceded that he never complained to the *News* or the *Times* about these articles, never requested a retraction, nor knew of anyone who wrote to the *News* or the *Times* challenging the accuracy or the conclusions.

While the court below correctly held that petitioner had not established that these dispositions were not "suspiciously lenient," there can be no question that any of the documents offered by petitioner led Newfield to entertain doubts about his conclusion which had been previously expressed in the two largest newspapers in the New York metropolitan area. *St. Amant* v. *Thompson,* 390 U.S. 727 (1968). The Connolly letter criticized a Newfield article which was not published in the Book, and thus could not be evidence of actual malice. The transcripts, as well as the letters to New York Magazine merely confirmed the accuracy of the original articles*, with the sole addition of the fact that the prosecutor had acquiesced in some of the dispositions.

The Brooklyn Bar Report was criticized in the Book by Newfield as unpersuasive, since it was prepared by a single lawyer associated with the Brooklyn Democratic organization who interviewed neither Newfield nor any of the law enforcement officers involved in *People* v. *Burton.* (A 515) Moreover, the Brooklyn Bar Report was obviously in error regarding the sentence in *People* v. *Glover.* The Report stated that Judge Rinaldi's conditional release of Glover was within his "discretion" (R 185), whereas it was in fact knowingly illegal, as petitioner himself later conceded. (R 707) Lastly, the City Bar Report was not released until several weeks after the Book was published. (R 418, 514)

In short, there is simply no evidence that any of the documents available to Newfield altered his conclusion reached

* As acknowledged both by the Court of Appeals and all of the lower court judges who considered the case, outside of three minor inaccuracies conceded by Respondents (A 17) upon which petitioner places no reliance, the articles republished in the Book contained no factual error.

in the course of his extensive research.* None of his sources were of doubtful veracity, since he relied upon interviews with law enforcement officials (including officers David and Santise, and Rackets Bureau Chief Hynes), with Jerome McKenna, Chief Counsel to the Joint Legislative Committee on Crime, his review of the Committee's file on dispositions in organized crime cases, his review of the published criticisms in the other newspapers, as well as confidential interviews with prosecutors, judges, lawyers and prisoners. (R 516) Of course, before the Book was completed, his adverse conclusions were further corroborated by petitioner's indictment.

B. "Probably Corrupt"

The term "probably corrupt" appeared only once in the Book, in a postscript to the August 31, 1972 article. In the postscript, just prior to the use of this expression, Newfield had written:

> "On November 12, 1973, Judge Rinaldi was indicted on three counts of perjury by a grand jury impanelled by Special State Prosecutor Maurice Nadjari. He was also indicted on one count of obstruction of justice. The perjury involved criminal cases Judge Rinaldi was suspected of fixing. If convicted on all counts Judge Rinaldi could be sentenced to 22 years in prison."

It is undisputed that the postscript was written and published while the plaintiff was under indictment. Since a grand jury of 23 persons had found that there was probable

* As noted by the court below, the author's affidavit stated that:

> "At the time I completed work on [the book], I had no reason to doubt the accuracy of the material contained therein and to this very day continue to believe in the accuracy of all the factual material contained in the book as well as the reasonableness of the many opinions I drew therefrom." (A 20)

cause to believe that plaintiff had committed four felonies (unrelated to the four cases previously reported by Newfield and others), it was perfectly proper for a reporter to adopt the opinion at that time and in that context that the petitioner was "probably corrupt," (a term which was not used in any other setting in the entire book), *Hotchner* v. *Castillo-Puche, supra,* especially since Newfield was aware from his extensive investigation of the severe criticism by the *Times,* the *News,* the New York Legislative Committee, law enforcement officials and even other judges.

While Newfield contends that, given the pendency of the indictment and the other information he had, the phrase constitutes an expression of opinion, there is simply no evidence that Newfield had any doubts as to the truth of the phrase at the time the Book was published. *St. Amant* v. *Thompson, supra.* Even if the statement was treated as one of fact and not opinion, none of the documents on which petitioner relies as evidence of knowing or reckless falsity (i.e., the transcripts of the four disputed cases, the letters written to *New York Magazine* in 1972, nor the Brooklyn Bar Report) contradicted the facts he had learned concerning the questionable dispositions in the four criminal cases reported in the Book (as the Court below found), nor the four counts of the indictment; nor do the documents have the slightest relevance to the allegations contained in the indictment. In short, Newfield's extensive prior research tended to corroborate, not to refute, Newfield's view that petitioner was "probably corrupt."

POINT III

The Petition Does Not Comply With Supreme Court Rule 23(4).

Rule 23(4) of the Supreme Court provides that:

> "the failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition."

This Petition is forty-five pages long and consists almost entirely of a mass of detailed facts and references to specific documents which accompany the Petition in an Appendix almost 300 pages long. This great mass of material does not present in a brief and clear manner any reasons for the granting of certiorari in this case and in fact graphically illustrates that the issues involved are narrow and factual.

Ordinarily a petition for certiorari should be no more than twenty pages. Only the most complicated cases should require more than that. Stern and Gressman, *Supreme Court Practice,* § 6.41 (4th ed. 1969). The Court has denied petitions on these grounds on numerous occasions. See, e.g., *Brown* v. *Krietmeyer,* 275 U.S. 496 (1927), *Jarnavgsstyrelsen* v. *National City Bank,* 275 U.S. 497 (1927); Annot. *Requirements of a Certiorari Petition,* § 5, 32 L. Ed. 2d 830 (1972) and cases cited therein.

As for the requirement of accuracy, respondent notes that the Appendix contains a glaring error in connection with a material fact. Marian Wood testified that the Book was placed on sale in bookstores in the period March 16-18, 1974. (R 348) This is a significant date, since as evidence

of actual malice petitioner relied heavily upon the City Bar Association Report, which concluded that Respondent Newfield had not substantiated his charges against petitioner. The report was released to the public on April 9, 1974 so that if the Book was on sale in March neither Newfield nor Wood could have seen the report at the time the Book was placed on sale. In petitioner's Appendix, Ms. Wood's testimony is reproduced (A 271-276); however the reproduction contains a shocking alteration in the transcript, so that it now reads that the book was released on *May* 16-18, (A 274) *after* the City Bar Report.

The alteration of the record is obvious—the letters "rch" have been erased and the letter "y" inserted somewhat off level. This alteration leaves the misleading impression that the Book was not published until after the City Bar Report became public. Moreover, the Petition emphasizes the technical publication date of April 15, 1974 (e.g., P 7, 29) furthering the misleading impression.

The material alteration, as well as the lack of brevity, violates Rule 23(4) and warrants denial of the writ.

CONCLUSION

For the foregoing reasons, the Petition for certiorari should be denied.

Respectfully submitted,

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November 7, 1977